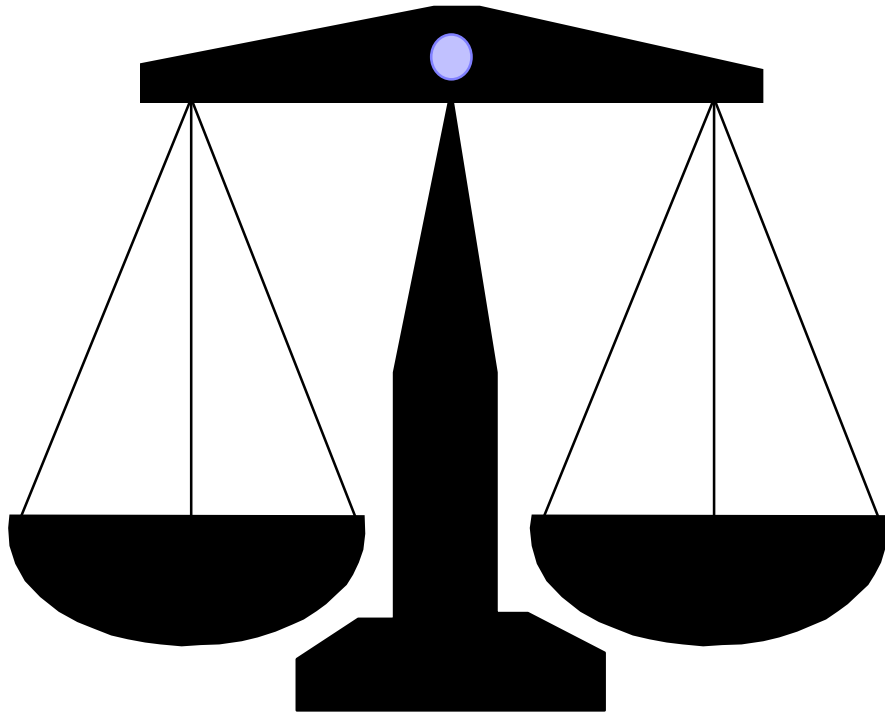


Jurisdiction and the Internet



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The issue of jurisdiction over Internet transactions is an area of increasing litigation and commentary. The entire subject matter of Internet jurisdiction is a new and ever-changing field. Findings and conclusions from today could change completely within the next six months. A snapshot of the state of the law at this moment in time is the most that can be stated conclusively.

Injuries inflicted over the Internet are instances of people hurting other people. In this sense, they are no different from the different ways people from one place injure people in other places, whether it is by the movement of dangerous products across borders, the multistate broadcast of defamatory information, or the breach of a contract established over the telephone.¹ The challenge posed by the Internet is that actions in one place can have both intended and unintended consequences all over the world. There is little an Internet user can do without losing control of where their actions will have consequences. This is a byproduct of the fact that the contents of a website can be accessed globally.

Historically, a state asserts its authority when a wrongful act is committed in its territory or when the consequences of such an act are suffered there. The advent of the digital age leads to an even more complicated analysis. Internet transactions raise significant questions as to where a specific act takes place because of the transmission of data across state and national borders. How that data is used within a state is at the heart of any jurisdictional analysis. Most courts initially evaluate the nature of an Internet website then look at the type of commercial activity involved to determine whether a state can assert jurisdiction over that transaction.² The novelty of this analysis is that the only contact with the state is through an Internet connection.

One response to the development of Internet commerce is to mimic the jurisdictional doctrine that evolved over the past century as a response to the increase in mobility and communications. A court that does so will base its findings on the location of a wrongful act and that act's effect over time rather than on the location of the person who initiated it.³ As stated by the United States Supreme Court, the person must have some sort of minimum contacts

¹ Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 THE INTERNATIONAL LAWYER 4 (Winter 1998).

² *Zippo Manuf. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997), cited by *David Mink v. AAAA Development LLC*, 190 F.3d 333, 336 (5th Cir. 1999).

³ *Zippo*, 952 F.Supp.1119, 1124, citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

with the state in question in order for that state to fairly and justly assert jurisdiction.⁴

A state can assert jurisdiction over, and thus apply its own laws to, a person who causes harm within the state. This holds true even if the person inflicts harm from a location outside of the state. The advent of the Internet means that transactions can now be initiated from nearly anywhere and still have an effect in various states. Jurisdiction in these cases must be measured by a relationship between the initiator of contact and the consumer that goes beyond their physical location. A website that merely advertises a product doesn't give rise to a relationship where jurisdiction over the advertiser is appropriate. Where the website allows information to be exchanged with another computer, however, jurisdiction is determined by the level of interactivity and by the commercial nature of the information exchanged.

From an historical perspective, there are two key United States Supreme Court cases to take into account when discussing jurisdiction: Worldwide Volkswagen v. Woodson⁵ and Calder v. Jones⁶. In Volkswagen, the Court held that the act of selling an automobile in New York was insufficient to subject the seller to jurisdiction in Oklahoma, the place of injury. The merchant must "purposely avail" itself of the privilege of conducting business in a state before that state can assert jurisdiction over it.⁷ The car dealership was not responsible for, nor did it benefit from, the car's transport to Oklahoma.⁸

In one sense, Volkswagen is directly analogous to at least some forms of Internet-based claims. Only if a merchant based on the Internet seeks out a connection across state lines can such conduct be a predicate for jurisdiction in a distant state. The distinction to be drawn is illustrated by this question: is an Internet merchant engaged in a local activity that can conceivably have global consequences; or is the merchant targeting potential business outside of its local area by using the global connection that is an inherent part of a website? The answer to this question may determine whether a merchant is subject to the jurisdiction of another state based on contacts made over the Internet. For example, a

⁴ International Shoe, 326 U.S. 310 (1945).

⁵ 444 U.S. 286 (1980).

⁶ 465 U.S. 783 (1984).

⁷ Volkswagen, at 297.

⁸ Id., at 299.

website that allows a customer to place carry-out orders online for Indianapolis restaurants is obviously engaged in a local activity. It can still be accessed globally, and there is a possibility that a customer from another state could place an order and be charged for a service they never receive. In this situation, however, the merchant does not target customers outside of the Indianapolis area. The possible injury would be caused in a state where the merchant did not purposely avail itself of the privilege of conducting business. Therefore, the assertion of jurisdiction by that state would not be appropriate.

Another example comes from CompuServe, Inc. v. Patterson⁹ where CompuServe sued a Texan in an Ohio federal court. The District Court judge dismissed the Texas defendant because of lack of jurisdiction. However, the appellate court reversed because the Texan had targeted some of his sales activities on Ohio. Therefore, the Texan did have sufficient contact with Ohio for jurisdiction to be asserted there.

Calder provides a contrast in the Court's treatment of jurisdictional issues. In this case the publishers of the *National Enquirer* were as indifferent to where their product ended up as the car dealership in Volkswagen had been. They had no control over where the paper was distributed. Nonetheless, the Court held that the Florida-based publishers had sufficiently affiliated themselves with California by knowingly defaming a California resident in a publication that they knew would be distributed in California.¹⁰ The fact that they weren't responsible for distributing it there had no bearing on the case.

The logic of Volkswagen suggested that the defendants in Calder could claim that producing a story in Florida had California consequences beyond their control. Instead, the Court treated them as being involved in interstate commerce. The newspaper's connection with California was established by the link between the distributors and the publishers. Courts have similarly imputed jurisdictional contacts of a large manufacturer based on links to its part-makers.¹¹

It is especially significant that the Court viewed the publishers' behavior as targeted on California. If the very purpose of the publishers' action was to inflict injury in California, it was as if they had fired a gun in

⁹ 89 F.3d 1257 (6th Cir. 1996).

¹⁰ *Id.*, at 790.

¹¹ Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102 (1987) (Brennan, J. Concurring); Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 760 (1961).

Florida that hit its target in California. Conversely, there was no legitimate local activity that was burdened by subjecting Florida publishers to California jurisdiction. The focus of their actions on California gave that state authority to regulate California-specific conduct.

Similarly, in Software Inc. v. Reliability Research Inc.¹² a bulletin board system (BBS) operator from Nevada whose BBS allegedly libeled someone in California was found to be under California jurisdiction. The court held that there was sufficient "minimum contact" with California because through computers, someone can communicate with several states simultaneously and thus target their actions on different states.

The characterization of Internet commerce will vary depending on the methods used to determine whether the involved activity is local or global. Although running a website can be characterized as global, rather than local, behavior, courts have generally resisted subjecting defendants to jurisdiction solely on the basis that their communication was accessed from the state attempting to assert jurisdiction.¹³ Just as the Supreme Court in Volkswagen was unwilling to burden the sale of automobiles with the responsibility of defending claims wherever the automobile might cause an injury¹⁴, lower courts have been largely unwilling to burden Internet activity with the threat of global jurisdiction.¹⁵

Instead, courts look to the nature and quality of the commercial activity that a merchant conducts over the Internet when determining whether jurisdiction is appropriate. In an Internet gambling case, the Western District of Texas stated that the sliding scale discussed in Zippo Manuf. Co. v. Zippo Dot Com, Inc.¹⁶ is consistent with personal jurisdiction principles.¹⁷ The court described the sliding scale:

"At the one end are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet.

¹² 631 F.Supp. (C.D. Cal. 1986).

¹³ See, e.g., Weber v. Jolly Hotels, 977 F.Supp. 327 (D.N.J. 1997); Hearst Corp. v. Goldberger, 1997 WL 97097 (S.D.N.Y. 1997); Edberg v. Neogen Corp., 1998 WL 458249 (D.Conn. 1998).

¹⁴ See, e.g., Volkswagen, 444 U.S. 286 (1980).

¹⁵ See Scherr v. Abrahams, 1998 WL 299678, *4 (N.D. Ill. 1998).

¹⁶ Supra, at 1.

¹⁷ Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738, 742 (W.D. Tx. 1998).

At the other end are passive Website situations. A passive Website that solely makes information available to interested parties is not grounds for the exercise of personal jurisdiction. Interactive Websites, where a user can exchange information with the host computer, represents the middle ground. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity between the parties on the Website."¹⁸

In Thompson, the court held that jurisdiction was appropriate since the defendant continually interacted with casino players, contracting with them to play various games with full knowledge that he would receive a commercial gain from these contracts. In addition, the gamblers played the games as if the games were physically located in Texas, and if they were to win, the defendant would send the winnings to that person in Texas.

The nature of the claim asserted is also critical to a court's assessment of whether a merchant has sufficiently affiliated himself with a state to confer personal jurisdiction based on Internet activity. The distinction between "targeted" impact versus unintended consequences in the state appears to be crucial.¹⁹ The mere foreseeability that residents of a state might access a website does not sufficiently affiliate a merchant with the state to satisfy due process. Such cases demonstrate the tension between Volkswagen and Calder, where the defendant's website has a foreseeable but non-targeted impact in the forum. Most courts are unwilling to burden Internet activity with the cost of defending litigation in every forum in which such activity has unintended consequences, and find Volkswagen to be the more compelling precedent.

Only where a defendant specifically directs his conduct toward another state has jurisdiction been consistently sustained, as in Calder. This has held true with "domain squatters", for example, those who reserve familiar domain names in order to sell them back to the commercial enterprise associated with it. The domain squatter is motivated by the impact his action would have on the commercial entity; thus his behavior is easily characterized as targeted at that entity's domicile. In contrast, cases involving trademark infringers have been

¹⁸ Id.

¹⁹ See, e.g., Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2nd Cir. 1997); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997).

treated differently.²⁰ The use of a protected mark on a web page is not necessarily an attempt to affect the plaintiff even if such an effect could be predicted.

Another category of Internet cases involves breaches of contractual obligations formed as a result of Internet solicitation. The contract cases are fairly consistent in their use of the targeted/untargeted distinction. Where a party has allegedly breached a contractual obligation formed through Internet solicitation, the subsequent direct dealings between the parties provides the targeted behavior, thus mooting the cyber-source of the relationship.²¹ There is nothing inherently special about contracts formed over the Internet that would subject them to a different standard from other interstate contracts. A breach that causes harm within a state opens the breaching party to the jurisdiction of that state.

The targeted/untargeted distinction also accounts for the interest in whether a website is only readable or is interactive in some way. Such a distinction may be technologically naïve because at some level all websites are interactive. A web browser sends packets of information to virtually every website server. Whether it additionally receives other data should not be jurisdictionally significant per se. What is significant is whether that information puts a merchant on reasonable notice that his conduct will have consequences in a particular place. If a browser has supplied the website with a name and address, it would not be unreasonable to characterize such conduct as targeted.²²

Courts have also examined the intent to attract users to websites, leading to the formation of bilateral contracts. The Court of Appeals in Minnesota affirmed jurisdiction over a defendant who advertised an online gambling service, and had compiled a mailing list that included Minnesota residents, in State v. Granite Gate Resorts, Inc.²³ The court upheld jurisdiction over a civil injunction proceeding brought by the Minnesota Attorney General against the Nevada defendant. The complaint alleged that the defendant was defrauding Minnesota residents in suggesting that they could legally gamble from home through the defendant's planned Internet casino website. The defendant was charged with an intentional

²⁰ See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 989 F.Supp. 616 (C.D. Cal. 1996).

²¹ See, e.g., *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Hall v. LaRonde*, 66 Cal. Rptr. 2d 399 (Ct. App. 2d Dist. 1997).

²² *Zippo*, 952 F.Supp. 1119.

²³ 568 N.W. 2d 715, 717 (Minn. Ct. App. 1997), *aff'd* 576 N.W.2d 747 (Minn. 1998).

wrong affecting Minnesota residents even though his behavior was not targeted at a particular place.

The court reasoned that Internet advertisements are similar to direct mail solicitation in that advertisers distribute messages to Internet users. The users must then take affirmative steps in order to receive the advertised product.²⁴ Contracts formed under these circumstances are not unilateral. The website indicated the company's intent to contract with customers from a broad geographic area that included Minnesota by stating that it was "open to International markets."²⁵ At this point the court employed a test made up of five factors to determine the constitutional validity of the state exercising personal jurisdiction:

1. Quantity of contacts.
2. Nature and quality of contacts.
3. Relatedness between the contacts and the cause of action.
4. Interest of the state.
5. Convenience of the parties.²⁶

The court found that the defendant had a clear intent to solicit business from Internet users in Minnesota by registering 248 contacts in a two-week period. This included at least one successful solicitation. Since the cause of action arose out of these contacts and the state had an interest in regulating gambling, jurisdiction was appropriate.²⁷

This type of case becomes problematic since there is currently no way of limiting access to browsers located in particular geographic locations. The only way to prevent the threatened injury is for the court to enjoin the dangerous conduct globally. This raises the problem of a state with a relatively small interest imposing its regulatory norms globally. The Internet geometrically multiplies the number of transactions that implicate more than one state. This does not mean, however, that there are no workable standards by which to measure jurisdiction.

Steven Betensky's article/speech, Jurisdiction and the Internet, 19 Pace L. Rev. 1 (1998), lists seven factors that have been considered when determining whether jurisdiction is appropriate for interactive websites:

²⁴ Id., at 720.

²⁵ Id.

²⁶ Id., at 721.

²⁷ Id., at 722.

1. Does the site require registering or signing on to the website?
2. Have agreements been entered into through the website?
3. Is e-mail available?
4. Have users located in the forum accessed the site?
5. Is the site commercial in nature?
6. Does the site solicit sales through the site and is there a contract?
7. Is the site primarily local or does it serve a national market?²⁸

These factors have also been applied for determining whether a site is passive or interactive.²⁹ The distinction between passive and interactive websites is not entirely clear, as different courts have weighted these factors in different ways.³⁰

Stomp, Inc. v. NeatO, LLC³¹ is a patent infringement case that refers to Zippro and finds that the commercial nature of the website supports establishing jurisdiction over the defendant.³² The use of the website placed products into the stream of commerce, and NeatO intended consumers to purchase its products over the Internet. By using the Internet with the intent to engage in interstate commerce and actually doing so, NeatO established the minimum contacts necessary for jurisdiction.³³

Resuscitation Technologies, Inc. v. Continental Health Care Corp.³⁴ also refers to Zippro in allowing the exercise of personal jurisdiction due to the numerous and continuous use of e-mail messages over a period of several months. The court stated, "The quality of those electronic contacts is measured with reference to the intended object of that activity."³⁵ The parties communicated via e-mail and regular mail, in addition to personal meetings outside the state. All of these contacts were intended to negotiate a commercial agreement to transact business. Since the parties intended to transact business and

²⁸ Betensky, at 11-13.

²⁹ See Cybersell, 130 F.3d at 419.

³⁰ Betensky, at 16.

³¹ 61 F.Supp.2d 1074 (C.D. Cal. 1999).

³² Id., at 1078.

³³ Id.

³⁴ 1997 WL 148567 (S.D. Ind. 1997).

³⁵ Id.

exchanged several e-mail messages stating this intent, jurisdiction was appropriate.

While there is no true consistency in the decisions to date, that is nothing unique in the law of jurisdiction. The new technology of cyberspace does not do away with the historical notions of jurisdiction. Commercial transactions over the Internet can be viewed through these historical notions and can be found to exhibit the necessary targeted conduct with local effects that brings them under the ambit of a state's jurisdiction.

In conclusion, there are three basic approaches to jurisdiction and the Internet: (1) contracts entered into through a website; (2) cases involving interactive sites; and (3) cases involving passive websites. In cases involving contracts where there is repeated transmission of information, jurisdiction is appropriate. In cases involving passive websites, advertisements and the like, jurisdiction is not appropriate. In cases involving interactive websites where at least some information is exchanged, jurisdiction will depend on the nature and quality of those contacts.